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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO LOVATO, Defendant and Appellant.	B209946 (Los Angeles County Super. Ct. No. BA335657)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Francisco Lovato (appellant) was convicted by a jury of evading a police officer with willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)); driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)); and driving while having a blood alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b)). The court also found that he had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b) and that he had suffered three prior serious or violent felony convictions within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). After the court struck his prior convictions, appellant was sentenced to three years in prison. He appeals, contending the court erred in allowing the prosecutor to present evidence which was not revealed to the defense until shortly before trial. We affirm the judgment.

STATEMENT OF FACTS

On December 14, 2007, at approximately 5:30 p.m., Los Angeles Police Department Officers Alicia Castro and Felipe Vasquez were in their patrol car stopped at a traffic light on Sunset Boulevard and Alvarado. They noticed a black Ford Explorer as it illegally passed them in the bicycle lane and stopped at an angle in the intersection. They could see that the male driver had brown hair and was wearing a gray hooded sweatshirt. When the light turned green, the driver drove erratically at high speeds and failed to stop at red lights. The officers activated their lights and siren but the driver failed to stop. He drove on Sunset into the driveway of an apartment complex on Sanborn Street. The driver exited the truck and a beer can fell out. Because it was dusk and there were lights on in the parking lot, the officers could see that he was wearing blue jeans and a hooded sweatshirt. The driver ran, climbed a chain link fence, and went into an apartment at 1043 Hyperion. The officers retrieved a set of keys on a key chain from the Explorer. They checked the registration, which listed Maria Munoz or Nunez as the owner with the address of 1043 Hyperion, apartment 102.

The officers set up a perimeter in the area, and approximately one hour later, Officers Castro, Vasquez, and five other officers went to apartment 102. They knocked on the outer door several times. After several minutes, Officer Vasquez used a key from the key chain found in the car to open the door. As he opened the inner door, he saw a figure running. No one was in the living room area of the apartment, but the officer found appellant, a toddler, a young girl, a woman, and an older woman in the back room. Appellant was wearing cut-off shorts and a white shirt but Officer Castro recognized him as the driver. There was a gray sweatshirt on the floor of the living room. The older woman told the officers that appellant ran into the apartment, took off his sweatshirt, and told everyone to go into the back room. Appellant was arrested and taken to the police station.

At the police station appellant was read his *Miranda*[1] rights. He told Officer Cesar Rodriguez that he had drunk four "Bud Lights" from 5:30 p.m. to 6:45 p.m. but that he had not been driving that night. He had a flushed face, bloodshot and watery eyes, slurred speech, and his breath smelled of alcohol. He failed to complete several field sobriety tests and his blood alcohol level was tested and found to be .12 percent, the equivalent of five 12-ounce beers.

At trial, appellant called several witnesses, but he did not testify.

Appellant's employer, David Thoresen, testified that on the day of the arrest, appellant was working for him and they arrived home together sometime after 5 p.m. Appellant went to Thoresen's house, which was next door to appellant's, and they smoked and talked. Appellant then walked home.

Roger Lopez, a family friend of appellant's, was at appellant's home around 5:30 p.m. He saw appellant outside smoking a cigarette. Appellant's wife arrived home with a baby and they went inside the apartment together. Lopez saw appellant go outside again, but police arrived and told appellant to go back inside.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

Appellant's wife, Maria Nunez, testified that she arrived home around 5:15 p.m. Appellant was home and he came out to help her carry things inside. Appellant went outside to smoke a cigarette, but the police officers told him to go back inside. Appellant went inside and drank some beer. They were all watching television in the back room when the police arrived with their guns drawn. Nunez told the police that appellant had not been driving the truck but they did not believe her. Nunez said she had loaned the Explorer to a man named Cesar who had lived in the building for about nine months. On cross-examination, Nunez admitted she did not know Cesar's last name. She said she gave Cesar her entire key ring and that he had moved to Mexico.

Appellant's mother, Dolores Lovato, was at appellant's apartment on the day of his arrest. She was with appellant's grandmother, Rebecca,[2] and appellant's daughter. Rebecca was 78 years old and suffered from dementia, high blood pressure, and diabetes. Dolores left the apartment at 4:30 p.m. but appellant was not home. When she returned at 7:30 p.m., she found empty beer cans in the bathroom, which was not uncommon. She had washed a gray sweatshirt that day and had left it in the hallway. She owned the Explorer even though appellant's wife's name was on the registration. She usually had the car but had loaned it to appellant's family the day prior to the arrest. Nunez had loaned the car to Cesar without Dolores's permission.

In rebuttal, the prosecution called Jose Reyes, the manager of appellant's apartment building. Reyes said he had been the manager for 13 or 14 years and no one named Cesar had ever lived in the building.

In surrebuttal, Dolores Lovato testified that she knew tenants in the building who did not always tell Reyes when someone was staying with them. Dolores admitted, however, that she did not live in appellant's apartment building and was there only on days when she cared for her mother, Rebecca.

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[2] Rebecca did not testify at trial.

DISCUSSION

After both sides announced ready for trial, appellant's trial was set for June 25, 2008. On June 25, the matter was continued to July 1. The case was continued again to July 2. On July 2, the prosecutor informed the court and defense counsel that Officer Vasquez had just told him that appellant had made an incriminating statement during the booking process. Officer Vasquez said he had not documented the statement because he did not think that appellant had been read his *Miranda* rights by Officer Rodriguez. The prosecutor also said that appellant made a statement to Officer Rodriguez when he was reading him his *Miranda* rights, to the effect of "I wasn't driving, it wasn't me." That statement was not included in the police report and also not disclosed to defense counsel. Defense counsel objected to the admission of the statements. The court took the matter under submission pending Officer Rodriguez's testimony.

On July 8, 2008, after trial had commenced and Officer Castro had testified, court and counsel discussed the statements appellant had made to Officer Vasquez. Defendant had reportedly said to Officer Vasquez, "Look, you know I was driving, I know I was driving, but when it comes time for court, we'll play the game." The prosecutor apologized to the court on behalf of the district attorney's office and stated that he acted as swiftly as he could after the discovery of the statements. Defense counsel argued that there had been a violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and requested either dismissal of the case or a special jury instruction.

After argument by counsel the following day, the court ruled as follows: "I've heard and considered the arguments by both parties. I don't believe that the alleged statement of [appellant] made to Officer Rodriguez which was the exculpatory statement falls within the parameters of *Brady*. I do not find it to be a *Brady* violation. I do believe it was a self-serving statement. I contrast it from the situation where a defendant was denied the opportunity to have exculpatory evidence from some other party. . . . There is some prejudice to [appellant], but it is minimal. I do not think it rises to the level of a *Brady* violation. I do, however, believe that due to no fault on [the prosecutor], I believe

[he] has been quite diligent about turning over information as soon as he gets it, that the People through Officer Rodriguez with respect to this statement have not complied with Penal Code section 1054 in that the disclosure of this statement was not timely. I similarly find with respect to the statement that [appellant] allegedly made to Officer Vasquez, the inculpatory statement, that statement was also turned over during the pendency of this trial, and I also find that is also a violation of Penal Code section 1054. In looking at all the available sanctions, I do not believe that the ultimate sanction of excluding the evidence is warranted. I do note the fact that [the prosecutor] turned over this evidence as soon as he became aware of it. . . . I do believe the appropriate sanction would be to give an instruction to the jury regarding untimely disclosure of evidence and I will give that instruction as CALCRIM No. 306 and I have modified it to this situation . . . ." After further argument about the proposed instruction, it stated, "I strongly considered excluding the evidence in full. I do believe that the police officer's conduct in not turning over this statement, especially the inculpatory statement, until after the trial was pending, I'm quite skeptical whether or not that was a willful violation of the Penal Code section 1054, so I do believe that identifying the police officers as the guilty parties as it were is correct in this factual situation. So I am going to give CALCRIM 306 in the form which I read."

Officer Rodriguez testified on cross-examination that appellant told him he was not driving that night and conceded the statement was not included in his police report. The statement was made "[a]t the scene and at the station." The officers at the scene knew of the statement. He did not put the information in the police report because it is fairly common for intoxicated drivers to deny that they were driving. On re-cross, he testified he did not include the statement in his report because he was assigned to conduct a DUI investigation and transport appellant to the station and did not feel the statement was relevant.

Officer Vasquez testified that at approximately 11 p.m. on the night appellant was arrested, he spoke to appellant while the two men were in a holding cell prior to appellant's booking. Officer Vasquez commented about appellant's driving skills, and

appellant said, "I don't know what you are talking about. I wasn't driving." Officer Vasquez responded, "Come on. Don't disrespect me. I have some time on the job. You know, I know what I'm doing." Appellant laughed and said, "You know that I was driving and I know that I was driving, but you know when it goes to court, I'm going to play the game, and that's how it's played." Officer Vasquez responded, "You are right. That's the game and that's how it's played." Officer Vasquez said that he told his partner about the statement but did not tell her to include it in the arrest report because appellant had not waived his *Miranda* rights. After a bench conference, Officer Vasquez clarified his testimony, saying he did not personally know if appellant had waived his *Miranda* rights.

On cross-examination, Officer Vasquez stated that he did not tell the prosecutor about the statements appellant made in the holding cell until a few days prior to trial. Defense counsel then cross-examined Officer Vasquez on other inaccuracies in the police report. She asked him if he told the prosecutor that appellant made these incriminating statements "to get creative because you felt there were problems with the case?" Officer Vasquez denied that he did.

Defense counsel then moved for a mistrial because Officer Vasquez had initially said that he believed that appellant had invoked his *Miranda* rights but then stated that he personally had no knowledge about what appellant had said. The motion for mistrial was denied. When cross-examination resumed, defense counsel again asked him, "So when you signed this form without including the statement you are telling us today that [appellant] made, that was a lie when you said [the answers on the report] were true?" Officer Vasquez said that it was not. When defense counsel asked why he didn't include the statement in the report, the officer said, "It was just conversation that I had with him inside prior to booking him. I didn't think to put them in the report. . . . I thought it was important. I hadn't read him the *Miranda* rights myself."

During the course of repeated questioning, Vasquez reiterated that he had no idea whether appellant had been read his *Miranda* rights prior to admitting he was the driver of the Explorer. He was asked several times to describe the process of how a suspect is

given his or her *Miranda* rights and to explain why he did not check with the detectives to determine whether appellant had been read his rights before deciding not to include his statement in the police report.

The court instructed the jury as follows: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. Both the People and the defense must disclose their evidence to the other side before the trial within the time limits set by law. Failure to follow this rule may deny the other side to produce all relevant evidence to counter opposing evidence or to receive a fair trial. Police officers called as witnesses for the People failed to disclose statements allegedly made by the defendant during the investigation of this case within the legal time period. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

Appellant contends that the court should not have allowed Officer Vasquez to testify that appellant admitted to driving the vehicle. He asserts that if this contention is deemed forfeited due to trial counsel's failure to request that sanction, he was denied effective assistance of counsel. Finally, he argues that the failure of the prosecution to disclose his alleged admission to the defense was a violation of his federal constitutional rights as set forth in *Brady*.

Penal Code section 1054.1 requires the prosecutor to disclose to the defendant's counsel all statements of the defendant and all relevant evidence obtained as part of the investigation "*if it is in the possession of the prosecuting attorney* or if the *prosecuting attorney knows it to be in the possession of the investigating agencies*." (Italics added.) Penal Code section 1054.7 requires those disclosures to be made at least 30 days prior to trial. Section 1054.5 provides that upon a showing that a party has not complied with section 1054.1, "a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. [¶] . . . The

court may prohibit the testimony of a witness . . . *only if all other sanctions have been exhausted.*" (Italics added.)

The trial court has broad discretion to fashion a remedy in the event of a discovery violation. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) On appeal, we review any imposition of a discovery sanction for abuse of discretion. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

It is undisputed that police officers did not timely disclose this statement or put it in their arrest reports. It also is undisputed that the prosecutor disclosed the statement to the court and opposing counsel as soon as he learned about it from the officers.

The issue was brought up multiple times before the jury. The police officers were cross-examined at length as to why the information was not included in the report. After being instructed that it could consider the effect of the late disclosure of the evidence when weighing Rodriguez's and Vasquez's testimony, the jury evaluated the credibility of the officers and believed their version of the events.

The court acted in accordance with section 1054.5. The prohibition of the officer's testimony was only warranted if all other sanctions had been exhausted. As noted in *People v. Jackson* (1993) 15 Cal.App.4th 1197, the court may exclude the witness's testimony if it is willfully omitted in hope of obtaining a tactical advantage. There is no evidence that this was the case. The prosecutor was clearly taken by surprise by the last minute disclosure. The trial court acted within its discretion in crafting the remedy it chose.

In any event, any prejudice caused by the late disclosure was minimal. The evidence that was not included in the reports reflected that appellant gave two statements to the police on the evening of his arrest, one admitting and one denying that he had been driving. As the trial court observed, neither statement would have served to reveal the existence of another witness appellant could have presented on his behalf.

Moreover, given the strength of the case against appellant, the admission of his statements was harmless under any standard. Appellant was identified as the driver of the Ford Explorer and at the end of the police pursuit he was seen going into an

apartment at 1043 Hyperion. The officers determined that the Explorer was registered to appellant's wife, whose address was 1043 Hyperion, apartment 102. After the officers pounded on the front door of that apartment to no avail, one utilized the keys found in the abandoned Explorer to gain entry. The jury could reasonably have inferred that appellant was hiding from the police due to his failure to open the door and his attempt to huddle the family into the back room of the apartment. When officers went into the apartment, appellant was the only adult male located inside. In contrast, the defense suggestion that someone named Cesar was driving the car that evening was weakened substantially by several facts: (1) appellant's wife, who lent the Explorer to Cesar, did not know the man's last name; (2) nonetheless, she gave Cesar the keys to the vehicle on a ring that contained the keys to her apartment; (3) Cesar could not be located; and (4) the apartment manager of at least 13 years testified that no one named Cesar had ever lived in the building.

We need not address appellant's ineffective assistance claim. Even if counsel did not request that the evidence in question be excluded, it is clear the court was aware it had the power to impose that sanction and chose not to.

The contention that the untimely disclosure of appellant's statements constitute a *Brady* violation is without merit. *Brady* applies to discovery of information after trial which had been known by the prosecution but was unknown by the defense. (*United States v. Agurs* (1976) 427 U.S. 97, 103.) Here, the jury heard the evidence relating to the officers' failure to disclose during the trial and was able to consider it during deliberations. (*People v. Wright* (1985) 39 Cal.3d 576, 589-591.)

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.